



Signed and Filed: July 26, 2005

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 04-33139-DM7
ELDON BRAUN)	
)	Chapter 7
)	
Debtor.)	Adversary Proceeding
)	No. 04-3333 DM
STAR'S EDGE, INC. and)	
HARRY PALMER,)	
Plaintiffs,)	
)	
v.)	
)	
ELDON BRAUN,)	
)	
Debtor.)	
)	

**MEMORANDUM DECISION RE NONDISCHARGEABILITY
OF LIABILITY FOR COPYRIGHT INFRINGEMENT**

I. Introduction

Star's Edge, Inc. and Harry Palmer ("Plaintiffs") filed a Motion for Summary Judgment or Partial Summary Judgment seeking a determination that a federal district court judgment they recovered against Eldon Braun ("Debtor") is nondischargeable under

1 section 523(a)(6).¹ The district court judgment against Debtor is
2 for copyright infringement, libel per se, and attorney fees and
3 costs. At a hearing held on June 17, 2005, this court orally
4 announced its determination that the portion of the judgment based
5 on libel per se is nondischargeable. For the reasons stated
6 below, the court concludes that the portion of the judgment for
7 copyright infringement is also nondischargeable. The award of
8 sanctions, attorney fees and costs is also nondischargeable
9 because it is ancillary to a nondischargeable debt.

10 **II. Issue**

11 Is an award of statutory damages for intentional copyright
12 infringement a willful and malicious "injury" within the meaning
13 of section 523(a)(6) even when the district court stated
14 explicitly that there were no actual damages?

15 **III. Facts**²

16 In October or November of 2000, Debtor completed and released
17 The Source Course, a manuscript designed to help its readers
18 achieve increased consciousness and enlightenment. Prior to
19 producing The Source Course, Debtor had studied similar self-
20 improvement techniques through the Avatar course that was produced
21 and copyrighted by Plaintiffs. Debtor had advanced to the level
22 of Avatar Master and, as such, obtained copies of confidential
23 Avatar materials. Shortly thereafter, Debtor's relationship with
24

25 ¹ Unless otherwise indicated, all chapter, section and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

27 ² The following discussion constitutes the court's
28 findings of fact and conclusions of law. Fed. R. Bankr. P.
7052(a).

1 Plaintiff Harry Palmer soured due to several disputes over
2 Palmer's management of the Avatar program. Debtor left the
3 organization, but never returned his copies of the Avatar course
4 materials, and Palmer assumed the materials had been destroyed.

5 After publication of The Source Course, Plaintiffs filed suit
6 against Debtor alleging copyright infringement and libel per se,
7 among other claims. In a decision filed on July 15, 2003, the
8 United States District Court for the Middle District of Florida
9 (the "district court") found that Debtor had infringed Plaintiffs'
10 copyright and committed libel per se. That court awarded
11 Plaintiffs \$36,000 in damages based on the copyright infringement
12 claim, including \$30,000 of statutory damages and an additional
13 \$6,000 for unjust enrichment reflecting Debtor's profits from The
14 Source Course. The district court awarded Plaintiffs \$20,000 for
15 the libel per se claim and also ordered Debtor to pay sanctions
16 and Plaintiffs' attorney fees and costs.³

17 The copyright infringement award was based on 17 U.S.C.A.
18 § 504(c), which states in pertinent part that plaintiff is
19 entitled to "recover, instead of actual damages and profits, an
20 award of statutory damages for all infringements involved in the
21 action, with respect to any one work, for which any one infringer
22 is liable individually . . . a sum of not less than \$750 or more
23 than \$30,000 as the court considers just." The district court
24 went on to state that its award of \$36,000 "reflects the Court's
25 conclusion that Palmer has suffered no actual damages as a result

26 ³ The attorney fees and costs are yet to be determined.
27 Sanctions in the amount of \$5,740 were awarded to Plaintiffs on
28 September 17, 2002, and another \$24,332.53 was awarded on November
27, 2002.

1 of the infringement." The district court's conclusion that there
2 were no actual damages seems to be based on Palmer's admission
3 that his sales and enrollment in Avatar courses had not declined
4 because of availability of The Source Course. This court does not
5 know whether Plaintiffs attempted to prove actual damages, only
6 that Plaintiffs did seek statutory damages.

7 **IV. Discussion**

8 Under section 523(a)(6), a discharge under section 727 does
9 not discharge an individual debtor from any debt - "(6) for
10 willful and malicious injury by the debtor to another entity or to
11 the property of another entity". Debtor concedes that the
12 district court found his infringement conduct to be willful and
13 malicious. However, he claims that Plaintiffs suffered no injury
14 as a result of his conduct, and that the debt should be
15 discharged.

16 One Ninth Circuit Court of Appeals decision has held that a
17 debt owed for court-ordered sanctions is nondischargeable under
18 section 523(a)(6). Papadakis v. Zelis (In re Zelis), 66 F.3d 205,
19 210 (9th Cir. 1995). In Zelis, the California Court of Appeal had
20 ordered the debtor to pay sanctions to the plaintiffs and to the
21 court due to the debtor's filing of frivolous appeals. The Ninth
22 Circuit affirmed the bankruptcy appellate panel's decision to give
23 collateral estoppel effect to the California Court of Appeal's
24 findings regarding the imposition of sanctions. While part of the
25 sanctions award compensated the plaintiffs for attorney fees and
26 costs, the California Court of Appeal ordered the debtor to pay an
27 additional \$4,000 to that court. Zelis v. Papadakis (In re
28 Zelis), 161 B.R. 469, 471 (B.A.P. 9th Cir. 1993). In addition,

1 the state court sanctioned the debtor \$20,000 for filing a
2 subsequent frivolous appeal. Id. These sanctions do not appear
3 to serve as compensation for any ascertained amount of actual
4 damages suffered by the court or by the plaintiffs. Instead, they
5 were imposed because "filing a frivolous appeal necessarily causes
6 harm to the opposing parties . . ." Zelis, 66 F.3d at 209.
7 Despite the lack of a finding of specific injury to the
8 plaintiffs, the Ninth Circuit held that the sanctions were imposed
9 due to a willful and malicious injury and were thus
10 nondischargeable.

11 An award of statutory damages for copyright infringement
12 resembles the court-ordered sanctions of Zelis, not because of who
13 received the sanctions, but because some portion of the sanctions
14 did not serve as compensation for actual injury. Congress
15 presumably allows recovery of statutory damages in lieu of actual
16 damages in copyright infringement actions because it recognizes
17 that the existence of financial harm caused by a copyright
18 infringer is difficult to prove and difficult to quantify
19 accurately. See Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.,
20 329 F.2d 194, 195-96 (2d Cir. 1964) (stating that statutory
21 damages allow "the owner of a copyright some recompense for injury
22 done him, in a case where the rules of law render difficult or
23 impossible proof of damages or discovery of profits"). Additional
24 motives for imposing statutory damages might include deterring
25 future infringements or punishing infringers. However, Congress
26 labeled these damages as "statutory" rather than "punitive" which
27 suggests that they are not solely awarded for the sake of
28 punishment, but also as compensation for unproven harm. By

1 allowing the recovery of statutory damages, Congress decided that
2 it is appropriate to award damages in the absence of proven
3 injury. This decision signals that an act of copyright
4 infringement causes harm by its very nature. The court based its
5 award of sanctions in Zelis on the similar premise that frivolous
6 lawsuits necessarily cause harm, and the bankruptcy court found
7 that the debt was attributed to a willful and malicious injury.
8 Statutory damages for copyright infringement are also indicative
9 of injury and, therefore, are nondischargeable in bankruptcy.

10 Although the Ninth Circuit's decision in Zelis predates the
11 United States Supreme Court's decision in Kawauhau v. Geiger, 523
12 U.S. 57 (1998), and the Ninth Circuit's decision in Carillo v. Su
13 (In re Su), 290 F.3d 1140 (9th Cir. 2002), these more recent
14 decisions do not undermine the reasoning of Zelis. Geiger holds
15 that a debt attributable to an injury that results from
16 recklessness or negligence is dischargeable even if the act that
17 caused the injury was performed intentionally. Su holds that the
18 court must apply either a subjective test when determining whether
19 an act was performed with the intent to injure, or determine with
20 substantial certainty that injury would occur. Geiger and Su both
21 involve conduct that can result in more than one outcome. Geiger
22 determines the dischargeability of a debt incurred in a medical
23 malpractice judgment while Su involves a debt for a personal
24 injury resulting from an auto accident. Performing a medical
25 procedure and driving an automobile are activities that can be
26 executed intentionally, but in a manner that is reckless or
27 negligent with regard to the outcome. On the other hand,
28 activities such as filing a frivolous lawsuit (as the debtor did

1 in Zelis) or infringing a copyright (as Debtor did here) do not
2 have uncertain or variable outcomes. While a medical procedure
3 can result in either healing or harm, and a physician may cause
4 harm by negligence, copyright infringement is a categorically
5 harmful activity. One cannot commit intentional copyright
6 infringement and, through his negligence, cause financial harm to
7 the copyright holder. Rather, harm necessarily follows from the
8 act of infringing regardless of the infringer's state of mind when
9 creating the infringing material. Therefore, the decision reached
10 in Zelis and the decision reached today do not conflict with the
11 holdings of the Geiger court or the Su court.

12 In another quite recent decision, the Ninth Circuit held that
13 a judgment for libel could be attributed to a willful and
14 malicious injury within the meaning of section 523(a)(6). Jett v.
15 Sicroff (In re Sicroff), 401 F.3d 1101, 1107 (9th Cir. 2005).
16 Since the debtor conceded that his actions were willful, the
17 Sicroff court only determined that the debtor had caused a
18 malicious injury to plaintiff. Id. In its findings, the court
19 did not explicitly ascertain the existence of an actual, proven
20 injury to the plaintiff. The court stated that, for an action to
21 be malicious, it must necessarily cause injury, and that, since
22 "Sicroff's statements were directed at Jett's professional
23 reputation" they would "necessarily harm him in his occupation."
24 Id. at 1106. The Ninth Circuit must have reasoned that if conduct
25 necessarily causes harm, an independent finding of injury is

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1 unnecessary.⁴

2 Other bankruptcy courts have held that statutory damages for
3 copyright infringement result in nondischargeable debts without
4 expressly addressing the question of whether an award of statutory
5 damages implies the existence of an injury. In Continental Map,
6 Inc. v. Massier (In re Massier), 51 B.R. 229 (Bankr. D. Colo.
7 1985), a district court had awarded statutory damages to plaintiff
8 for copyright infringement based on 17 U.S.C. § 504(c). The
9 bankruptcy court stated that "[t]he mere fact that the district
10 Court awarded 'damages' is proof that Plaintiff sustained injury
11 and it matters not that these damages are labeled as 'actual' or
12 'statutory'." Id. at 231. The court also stated that "[w]here
13 there has been a willful copyright infringement, the [d]ebt
14 occasioned thereby is not dischargeable." Id. (citing Gordon v.
15 Weir, 111 F. Supp. 117 (E.D. Mich. 1953)).

16 Two other bankruptcy courts have held that a debt incurred
17 from statutory damages is nondischargeable even though the court
18 awarding the damages acknowledged that no actual damages were
19 established. In Brzys v. Lubanski (In re Lubanski), 186 B.R. 160
20 (Bankr. D. Mass. 1995), the court held that a debt incurred in a
21 right to privacy suit was nondischargeable. A state court had
22 awarded liquidated damages to plaintiff based on Massachusetts
23 General Laws, chapter 272, § 99 because the debtor had placed an
24 eavesdropping device in plaintiff's office, thereby violating her
25 privacy rights. The state court awarded these damages even though

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27 ⁴ In fact, the debt was declared nondischargeable before
28 the state court trial had been completed and before damages had
been quantified.

1 "no actual damages were established." Id. at 162. The Lubanski
2 court interpreted the liquidated damages provision of the
3 Massachusetts right to privacy statute as providing a remedy for
4 "an injury that existed but could not be proven." Id. at 167.
5 The court was "satisfied that, for the purposes of § 523(a)(6),
6 the damages awarded by the State Court were designed to remedy an
7 actual injury." Statutory damages for copyright infringement are
8 similar to unproven damages for violation of privacy in that
9 actual damages resulting from such a wrong are difficult to prove,
10 and legislatures have created a statutory remedy for this reason.

11 In Cablevision Sys. Corp. v. Cohen (In re Cohen), 121 B.R.
12 267 (Bankr. E.D.N.Y. 1990), the court declared a debt based on
13 statutory damages nondischargeable as a matter of law on a summary
14 judgment motion. Cohen involved a debtor who had distributed
15 illegal decoders that intercept free cable television channels.
16 The debtor's actions violated 47 U.S.C. § 553, the Cable Act,
17 which allows plaintiffs to recover either actual or statutory
18 damages as the court considers just. In the district court suit,
19 plaintiffs sought and won statutory damages because of the
20 difficulty of proving actual damages. Id. at 269. The bankruptcy
21 court stated that "[a]n award of statutory damages is not
22 indicative of a lack of injury," and noted that statutory damages
23 are "specifically intended for situations where it is virtually
24 impossible to quantify the extent of an individual's injury and
25 resultant monetary damages." Id. In rejecting the debtor's claim
26 that no injury existed, the bankruptcy court stated that "under
27 section 523(a)(6), the proper focus is not upon the injury but
28 rather the focus is upon the nature of the conduct that gives rise

1 to the injury." Id. at 272. Copyright infringement, like
2 distribution of illegal cable television decoders, is harmful to
3 the copyright holder by its very nature, and an award of statutory
4 damages indicates that the court found the violation to be
5 significant.

6 In addition, a bankruptcy court in Herman v. Remick (In re
7 Remick), 96 B.R. 935 (Bankr. W.D. Mo. 1987), tried a copyright
8 infringement action on the merits, awarded statutory damages, and
9 deemed the damages nondischargeable. The Remick court noted that
10 "[i]n determining whether an injury to property has been
11 committed, the standard is whether the defendants have committed
12 an act against the plaintiffs' property rights which is actionable
13 under the general law." Id. at 939. Under this standard,
14 Debtor's copyright infringement was indeed actionable under law
15 and, therefore, constitutes an injury to Plaintiffs' property.

16 Each of these cases supports the conclusion that statutory
17 damages exist for the purpose of compensating plaintiffs for
18 actual injuries that are difficult to prove. This court
19 interprets the district court's statement that "[Plaintiff] has
20 suffered no actual damages" merely to mean that Plaintiffs did not
21 establish actual damages. Regardless of this distinction, an
22 award of statutory damages for copyright infringement is
23 indicative of an injury. For this reason, Debtor's willful and
24 malicious copyright infringement results in a nondischargeable
25 debt under section 523(a)(6).

26 Throughout section 523(a), the term "debt for", as found in
27 "debt for willful and malicious injury" in section 523(a)(6),
28 refers to any debt incurred as a result of that injury and does

1 not limit the nondischargeable debt to liability for the injury.
2 Cohen v. de la Cruz, 523 U.S. 213, 220 (1998). Cohen v. de la
3 Cruz held that a judgment awarding attorney fees and costs in a
4 suit for fraudulently obtained rent money resulted in a
5 nondischargeable debt under section 523(a)(2)(A). Id. at 223.
6 The Court based its judgment on the reasonable meaning of the
7 various exceptions to discharge set forth in section 523(a) and on
8 the policy concerns underlying these exceptions. This court
9 concludes that, under Cohen v. de la Cruz, Debtor's obligation to
10 pay sanctions, attorney fees and cost to Plaintiffs is also
11 nondischargeable under section 523(a)(6).

12 **V. Conclusion**

13 For the reasons stated above, Plaintiffs' Motion for Summary
14 Judgment will be GRANTED. The debts for copyright infringement,
15 libel per se, and sanctions, attorney fees and costs are
16 nondischargeable under section 523(a)(6). Counsel for Plaintiffs
17 should submit a separate order granting the motion for the reasons
18 stated herein, and a judgment declaring the district court
19 judgment nondischargeable. Counsel should comply with B.L.R.
20 9021-1.

21 **END OF MEMORANDUM DECISION**
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